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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DONALD RAY STIDMAN, Defendant and Appellant.	F063328 (Super. Ct. No. SC028703A) **O P I N I O N**

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Michael E. Dellostritto, Judge.

J. Anthony Bryan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J., and Poochigian, J.

In March 1985, appellant, Donald Ray Stidman, pursuant to a plea agreement, pled guilty to one count of assault with a firearm (Pen. Code, § 245, subd. (a)(2)). In May 1985, the court placed appellant on three years' probation.

In August 2004, appellant filed a "Notice of Motion for Change of Plea, Dismissal of Charges and Reduction of Case to Misdemeanor." (Unnecessary capitalization omitted.) In his accompanying declaration, appellant averred that he had completed the terms of probation. In September 2004, following a hearing, the court, inter alia, dismissed the count of which appellant had been convicted, pursuant to Penal Code section 1203.4.

In June 2011, appellant filed a petition for writ of error *coram nobis* in which he sought to withdraw his plea of no contest to the instant offense and enter a plea of not guilty.[1] In August 2011, the court denied the petition. The instant appeal followed.

On appeal, appellant contends the court erred in denying his petition. We affirm the judgment.

PROCEDURAL BACKGROUND

In his petition, appellant stated that he sought to withdraw his plea in the instant case "on the grounds that [his] plea was not knowing and voluntary," and asserted the following: His appointed counsel informed him that the prosecution had made an offer that appellant plead guilty to a single count of assault with a firearm "in exchange for a probationary sentence." Appellant told his counsel, "he wished to reject the offer and proceed to trial." Appellant's counsel "responded by threatening to abandon the case, so [appellant] acquiesced and accepted the plea offer." Appellant "concluded that he would have to proceed without an attorney if he failed to [plead guilty]." Appellant "had a

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[1] In general, we refer to the writ of error *coram nobis* as the "*coram nobis* petition." We refer to appellant's *coram nobis* petition as the "petition."

legitimate defense and always desired a trial." His counsel "was uninterested in [appellant's] protestations and declarations of innocence."

In support of his petition, appellant submitted a declaration in which, in the portion in which he states the basis of his claim for relief, he averred as follows:

"At the time that I discussed my case with the Deputy Public Defender assigned to me at the time of my Plea, said attorney showed no interest in my case and evinced no willingness to consider what I regarded as a defense to the charges.

"The Deputy Public Defender told me if I did not plead guilty to the charges, that if I did not accept the offer and plead as offered and charged, that he, (the Deputy Public Defender) would withdraw as my attorney, thereby leaving me without counsel.

"I had never seen nor spoken with this Deputy Public Defender before the day of my Plea nor had he made any attempt to contact me. When the judge asked me if I had been threatened in any way, I answered in the affirmative. However this was passed over and the Court accepted my Plea of guilt [*sic*] even though I had been threatened by the Deputy Public Defender to withdraw as my attorney and thereby violate my sixth amendment right to counsel.

"I assert my innocence. I was overwhelmed by my attorney's threat to withdraw."

The remainder of the declaration consists of a paragraph in which appellant refers to his archery shop business, and a paragraph in which he explains that although the instant offense was dismissed pursuant to Penal Code section 1203.4, he "still suffer[s] from legal disabilities as a felon because of this conviction.[2]

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[2] Because a judgment of conviction exists for some purposes after the granting of relief under Penal Code section 1203.4, the granting of such relief does not exempt a judgment from attack by *coram nobis* petition. (*People v. Wiedersperg* (1975) 44 Cal.App.3d 550, 554.)

A hearing on the petition was held on August 11, 2011. The prosecutor argued that appellant's failure to raise the claim that his plea was coerced until the present, 26 years after he entered his plea, at a time when "there absolutely is no written transcript" of the proceeding at which appellant entered his plea, precludes the granting of the relief sought. Defense counsel argued that appellant's no contest plea was the product of "extreme coercion" and therefore appellant should be allowed to withdraw his plea.

The court took the matter under submission and issued a written decision denying the petition on August 23, 2011. The court stated two grounds for its decision. First, noting that "[appellant's] allegations primarily focus on his attorney's misconduct," the court stated, "a [*coram nobis* petition] does not lie to vacate a guilty plea solely on the ground that it was induced by ineffective assistance of counsel, which is what [appellant] attempts to do here." Second, the court stated, "[Appellant] also fails to establish due diligence in seeking the remedy at this late date.... There is nothing before the court justifying [appellant's] 25 year delay in bringing this action."

DISCUSSION

Appellant contends the court erred in denying his petition because his 1985 plea was involuntary. There is no merit to this contention.

"'"The writ [of error *coram nobis*] will properly issue only when the petitioner can establish three elements: (1) that some fact existed which, without his fault or negligence, was not []presented to the court at the trial and which would have prevented the rendition of the judgment; (2) that the new evidence does not go to the merits of the issues of fact determined at trial; and (3) that he did not know nor could he have, with due diligence, discovered the facts upon which he relies any sooner than the point at which he petitions for the writ. [Citations.]" [Citations.]' [Citations.]" (*People v. Dubon* (2001) 90 Cal.App.4th 944, 950-951.)

To show due diligence, "'it is necessary to aver not only the probative facts upon which the basic claim rests, *but also the time and circumstances under which the facts were discovered*, in order that the court can determine as a matter of law whether the litigant proceeded with due diligence[.]'" (*People v. Carty* (2003) 110 Cal.App.4th 1518, 1528; accord, *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1619 (*Castaneda*) ["[A] defendant who seeks to set aside the judgment on a petition for a writ of error *coram nobis* must allege the time and circumstances under which the new facts were discovered in order to demonstrate that he has proceeded with due diligence"].)

"Since the pleading requirements are strict, 'it will often be readily apparent from the petition and the court's own records that a petition for *coram nobis* is without merit and should therefore be summarily denied.'" (*People v. Kraus* (1975) 47 Cal.App.3d 568, 575, fn. 4, quoting *People v. Shipman* (1965) 62 Cal.2d 226, 230 (*Shipman*).)

As best we can determine, the "fact" upon which appellant bases his claim for *coram nobis* relief is his claim that his attorney threatened to abandon him if he did not accept the prosecution's plea offer. It was this "fact," appellant argues, that rendered his plea involuntary. Appellant suggests that his declaration contains a sufficient showing of this fact and that, without more, he is entitled to relief. Thus, he argues, in effect, that he need only establish the first of the three elements required for *coram nobis* relief.

Appellant's argument ignores the diligence requirement. By his own account, as set forth in his declaration, appellant was aware of the conduct of his attorney about which he now complains at the time of that conduct. Yet, appellant did not offer in his declaration any explanation as to why, although he was aware at that time of his 1985 plea of the facts which purportedly rendered his plea invalid, he waited until 2011 to challenge the validity of his plea. Indeed, he did not directly respond to the prosecution's argument on this point at the hearing on his petition, nor has he done so at any time since. On this record, appellant, having failed to explain in his petition why he waited more than

26 years to seek relief, has failed to establish reasonable diligence, and has therefore failed to establish a prima facie case for *coram nobis* relief. Therefore, his petition was properly denied. (Cf. *Castaneda, supra,* 37 Cal.App.4th at p. 1619 [*coram nobis* petition denied where petitioner "[did] not allege ... why he waited [six years] to seek relief"]; see *In re Watkins* (1966) 64 Cal.2d 866, 872 [where petitioner's *coram nobis* petition filed in appellate court was dismissed because he did not file it first in the trial court, such petition "would have to be dismissed even if it had been brought in the proper court" because "petitioner has waited nearly eight years before seeking relief ... and has offered no explanation for the delay"].)

Appellant also argues that the court erred in denying the petition "summarily" and in "not allow[ing] an evidentiary proceeding on [the petition]." The record belies the major premise of this claim. The court did conduct a hearing on the petition. Moreover, at that hearing, defense counsel submitted the matter after arguing his position, and did not seek to present evidence. Therefore, it cannot be said that the court did not "allow" an evidentiary proceeding. And, in any event, appellant was not entitled to a hearing. (*People v. Lampkin* (1968) 259 Cal.App.2d 673, 675 [in a *coram nobis* proceeding, a defendant must establish a prima facie case in order to be entitled to a hearing]; *People v. Hemphill* (1968) 265 Cal.App.2d 156, 160 [same].)

Next, appellant argues that although, under *Shipman*, a *coram nobis* petition may be summarily denied when it is "apparent from the petition and the court's own records that a petition for *coram nobis* is without merit" (*Shipman, supra,* 62 Cal.2d at p. 230), the court in the instant case erred in denying the petition summarily because the court relied on the report of the probation officer (RPO), which cannot be deemed part of the "court's records." This argument fails for a number of reasons. It will suffice to note two of them: First, as demonstrated above, its major premise is invalid. The court did not deny the petition summarily without a hearing. Second, assuming for the sake of

argument the court's ruling can be deemed a summary denial, the court did not base its ruling on the RPO.

Apparently, appellant bases his claim to the contrary on the following statement in the court's written decision: "Petitioner contends he has met [the three requirements for *coram nobis* relief]. It is somewhat unclear to the court as to what constitutes the unknown 'fact.' If it is the attorney's threat to withdraw, it was known to the defendant at the time and presented to the court, if defendant is to be believed. There is no transcript of the plea. However, *there is a probation report wherein petitioner, contrary to his current claim of innocence, confesses his culpability to the police and the probation officer*."[3] (Italics added.) The italicized observation, however, formed no basis for the court's denial. As indicated earlier, the court stated two reasons for denying the petition: appellant's delay in filing the petition and the rule that ineffective assistance of counsel cannot be the basis for invalidating a plea in a *coram nobis* proceeding. Assuming the truth of appellant's characterization of the RPO—and we have no reason to doubt it—neither of the court's stated reasons for denying the petition is based on any confession appellant may have made.

Finally, appellant argues that he was "free of any negligence or fault in bringing ... to the attention" of the court in 1985 his claim regarding his attorney's conduct because appellant "tried to acquaint the court with the threat at the time, but was denied the opportunity to explain it." Assuming for the sake of argument these claims are true, they have no bearing on this appeal. Appellant's challenge to the denial of his petition fails because he did not demonstrate he acted with the diligence required for *coram nobis* relief. The circumstances of the entry of his plea have no bearing on this point.

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[3] The RPO is not part of the record on appeal.

As demonstrated above, appellant failed to establish a prima facie case for *coram nobis* relief in that he failed to exercise due diligence in moving to withdraw his 1985 plea. Accordingly, we affirm the judgment.[4]

DISPOSITION

The judgment is affirmed.

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[4] The People argue that the denial of the petition should also be upheld on the other ground stated by the court, i.e., because appellant's claim for *coram nobis* relief is based on a claim of ineffective assistance of counsel. Appellant acknowledges that claims of ineffective assistance of counsel are not within the scope of *coram nobis*. (See *People v. Soriano* (1987) 194 Cal.App.3d 1470, 1477 [claim that a defendant has been "deprived of effective assistance of counsel in making his guilty plea ... is not an appropriate basis for relief by writ of *coram nobis*"].) He argues however, that a *coram nobis* petition is the proper vehicle for his challenge to the validity of his plea because: "[T]he issue on appeal is not whether or not counsel was ineffective. The issue on appeal is whether or not [a]ppellant took a plea because he was threatened." Because we uphold the court's denial of the petition based on appellant's failure to comply with the diligence requirement for *coram nobis* relief, we need not address, and we express no opinion on, the question of whether appellant failed to state a prima facie basis for *coram nobis* relief because his claim for relief was based on a claim of ineffective assistance of counsel.